OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 23 May 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 23 May 2023

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DELEGATED POWERS AND LAW REFORM COMMITTEE

17th Meeting 2023, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Oliver Mundell (Dumfriesshire) (Con)
*Mercedes Villalba (North East Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Mike Blair (Gillespie Macandrew)
Joan Fraser
Ian Hood
Valerie Macniven (Church of Scotland Trust)
Mhairi Maguire (Enable Trustee Service)
Charlie Marshall (Wings for Warriors)
Chris Sheldon (Turcan Connell)
Madelaine Sproule (Church of Scotland Trust)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 23 May 2023

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 17th meeting in 2023 of the Delegated Powers and Law Reform Committee. I remind everyone present to switch their mobile phones to silent.

Under agenda item 1, the committee must decide whether to take items 6, 7 and 8 in private. Is the committee content to do so?

Members *indicated agreement.*

Trusts and Succession (Scotland) Bill: Stage 1

10:00

The Convener: Item 2 is evidence on the Trusts and Succession (Scotland) Bill. I welcome Valerie Macniven, a trustee at the Church of Scotland Trust; Mike Blair, a solicitor and trustee at Gillespie Macandrew; Joan Fraser, the chair of charitable trust at Edinburgh and Lothian Trust Fund Scottish Charitable Incorporated Organisation; Charlie Marshall, the general manager at Wings for Warriors; Mhairi Maguire, the director of corporate services at Enable Scotland; Chris Sheldon, a trustee at Turcan Connell; Madelaine Sproule, a solicitor at the Church of Scotland, who is joining us remotely; and Ian Hood, the trustee of a private trust, who is also joining us remotely.

I remind you not to worry about turning on your microphones during the session because they are controlled by broadcasting. If you would like to come in on a question, please raise your hand or indicate to the clerks; the witnesses who are online should please type RTS in the chat function. There is no need to answer every question, but feel free to follow up any question in writing after the meeting, if you wish.

I will start the questions from the committee.

Can you provide the committee with some background to the trust or trusts with which you have a connection and say how you became a trustee—or a beneficiary, if that is applicable? For example, what do the trusts with which you are involved aim to do? How many trustees, beneficiaries and potential beneficiaries do they have? We will start with Chris Sheldon.

Chris Sheldon (Turcan Connell): My attendance is in the capacity of a solicitor, a trustee and a director of trustee companies, both private and family trusts and Scottish charitable trusts.

In respect of Scottish charitable trusts, there is a range of interests in those charities and I got on board through professional engagements in my role as a solicitor and also through personal interests.

My connections with private and family trusts are in a professional capacity and the beneficiaries of those trusts vary considerably. They can be specific named individuals in the trusts or a broad range of beneficiaries such as direct descendants, some of whom might not even know that they are potential beneficiaries of discretionary trusts.

The trustees usually range between family members or friends of the settlors or trustees, or professional contacts acting in a professional capacity.

The role of director of a trustee company is familiar to many Scottish solicitors who manage and administrate trusts where, rather than having the solicitor appointed in a personal capacity, it is done through a corporate trustee arrangement where the directors of the trustee company are all bound and the trustee company is the trustee, along with family members.

Mhairi Maguire (Enable Trustee Service): As you said, convener, I am director of corporate services with Enable and I am also in-house counsel there. I came to Enable primarily to work in the trustee service, which is where we look after trusts for beneficiaries who have learning disabilities. We are in effect appointed as the corporate trustee, for want of a better description, in those trusts and the trusts tend to be established by parents who are looking to provide some sort of future security for their, most likely, adult child who has a learning disability.

We are also appointed in trusts where awards have been made through the Criminal Injuries Compensation Authority, again for vulnerable beneficiaries who are deemed either by the courts, or through prior assessment to that, to not have the capacity to manage an award themselves. We therefore look after those funds, in trust, on behalf of the beneficiaries, who tend to be people who have learning disabilities, family siblings and sometimes other family members.

There are a few trusts where we act as sole trustee and there are other trusts where we act alongside parents, grandparents, siblings, aunts and uncles or other family members. It tends to be family members, and they are not coming to work as trustees because they have a particular knowledge about trusts or a wish to do things in that particular way, but in order to safeguard a vulnerable family member and because they are looking to provide for that person as best they can.

Charlie Marshall (Wings for Warriors): I am the general manager and sole employee of the charity Wings for Warriors. We help physically disabled and medically discharged veterans from all the forces to retrain as airline pilots. Like many charities, we are dual registered: we have Office of the Scottish Charity Regulator registration and a Charities Commission number. I would be interested to know how the bill will affect those charities that are based down in England at the same time as being based in Scotland.

Joan Fraser: I am here representing two trusts. I am chair of the Edinburgh and Lothian Trust Fund, which is a grant-making trust confined to Edinburgh and the Lothians. We have three funding streams. First, there is the general fund, which is the majority of our fundraising and we give out grants to between 1,000 and 1,200 individuals in poverty in Edinburgh every year.

Secondly, we operate the Edinburgh fire fund, which dates back to the great fire of Edinburgh in 1824—it was established with money that was left over from a public subscription. We provide grants to householders who are on a low income and who have had a house fire and have no contents insurance. Thirdly, we operate the Edinburgh police fund, which is another historical fund, originating in 1892, which gives out small grants to families in poverty for the purchase of shoes and jackets for schoolchildren. We also give small grants to local voluntary organisations to help with things such as volunteering expenses.

Can I say something about the other trust? It is the one that concerns me.

The Convener: Sure.

Joan Fraser: I am also a member of the Newhaven Park Trust, which was established in 1876, when a lot of building was going on in north Edinburgh. Some proprietors got together and said, “Well, we’d like to keep a bit of green space” and so they bought some land, which later became Newhaven park. It is a green space, which is preserved for the amenity of the area.

There was a question mark over whether the people who own it, as it were—it is all written into the trust deeds—are trustees or proprietors, although I do not think that it really matters. The reason why I mention it is that I cannot see in any of the documentation around the bill a description of a trust that would fit our situation, so it is hard to see how the legislation would apply. I do not think that we are that unusual—there are other private gardens and parks in Edinburgh, which date from around the same time. I do not know how all of those are operated. For example, I know that Lomond Park is a company, but there is also Queen Street gardens and the other gardens all around the new town of Edinburgh. I have a slight concern that where such things are operated as trusts, they will not be covered by the bill.

The Convener: Thank you for that.

Mike Blair (Gillespie Macandrew): I am wearing my solicitor’s hat. In my time I have come across trusts impacting on a whole load of stuff. Examples include commercial partnerships; trusts that have been set up for people to manage bits of property without anyone having died, or inter vivos, as the lawyers say; private purposes trusts—I have at been involved in at least one of those having to be changed, some years ago; testamentary trusts arising when people have died; charitable trusts; and de facto trusts where

people have been left to manage money for young children under supervision. I am coming from the point of view of not a trust lawyer, but someone who has done a fair slice of that work as well as being a general purpose user of trust law in a variety of fields.

Valerie Macniven (Church of Scotland Trust): I am a trustee. Madelaine Sproule, from the Church of Scotland's law department, is appearing online.

The Church of Scotland Trust has two areas of function. One is probably of little interest to the committee, and that is the part that looks after the Church of Scotland's properties out of Scotland, of which there are still quite a number.

The part that will be of interest to the committee is the one that makes us the trustees for a miscellaneous selection of third party trusts that is very wide and varied, and some of them go back quite a long time. An example is when someone has died and left money for the benefit of the particular church in the area where they lived and its purpose might be further subspecified. Another example is when someone has left money for the provision of education for ministers' children or for the provision of housing for retired ministers and their immediate dependants. There is a range of trusts with various levels of income, and capital that supports the income.

The group meets twice a year and we endeavour to have a look at all the trusts, cyclically, during the year.

Ian Hood: Hello. I am a trustee for a single adult who has a learning disability. I am currently the only trustee of the trust. I took over in 2016, when the previous trustee retired.

The individual concerned received a significant amount of money in compensation for a particular issue, and I manage that money in line with the beneficiary's wishes. It is a discretionary trust, and there are some issues in the bill that I am interested in. In particular, I am concerned because—as the only trustee—I want to know what would happen if I became incapable of continuing to manage the trust. Therefore, some of the provisions in the bill, which we will talk about shortly, will be of interest. That is how I am involved.

Madelaine Sproule (Church of Scotland Trust): Valerie Macniven gave a very good description of what the Church of Scotland Trust does. I am a solicitor in the law department of the Church of Scotland, and I am also secretary of the Church of Scotland Trust. The only thing that I will add to what Valerie said is that because the Church of Scotland Trust and the Church of Scotland are registered with OSCR, all of our third party trusts are charitable trusts.

The Convener: Thank you for that. Ian Hood's point regarding being the sole trustee has not come up thus far in any of the sessions that the committee has had, and the next question that I will pose probably does not include you, Ian, but it is clear that your situation will not be unique, so I am keen to get your views as well.

Has the bill has got the balance right between powers given directly to trustees to act by majority, and powers for the court to authorise a decision about a trust? If you were to propose any changes to the bill in that area, what would they be?

Mike Blair: I reckon that the balance is probably about right, from my acquaintance with such trusts. It is not a huge innovation on quite a lot of what already happens, but it is intended to make it easier.

The one thing that struck me on reading through the papers—you should perhaps ask Chris Sheldon about this—is knowing when you have recorded for the future record that some trustee was not participating or was deemed to be incapable of participating or something like that. That was not abundantly clear to me on reading through.

10:15

Chris Sheldon: We will probably come on to the aspects of incapacity later, and others will probably have some points on that. The recording of decision making is critical and not necessarily bound within the legislation. However, the requirement for access to information is beginning to be built in, and that opens an opportunity for beneficiaries to understand better about aspects of the trust to which they could potentially be entitled.

I agree with Mike Blair that the balance is broadly right. There is clearly an extension of the jurisdiction of the courts, and I would probably echo the point made in the submission from the Law Society of Scotland about ensuring that the courts have sufficient capacity to manage that, but I broadly welcome the balance. I may have comments on some aspects that are referred to later on the agenda, which we will come to, such as on the alteration of trust powers, but there is nothing specific yet.

Mhairi Maguire: I think that the balance is good and has been achieved quite well. That is of particular comfort to me, as the trustees who we work with on a day-to-day basis are often people who are in receipt of means-tested state benefits. Putting in place a process that would require multiple rounds of visiting court, legal fees and so on that could not necessarily all be borne from the trust funds would put a significant burden on those people. There is a good balance; there is the ability for people to do what they need to do to

continue to run the trust, but whenever there are significant issues or difficulties there is a process for them to rely on.

Ian Hood: When I took over in 2016 there were two trustees. One of the trustees resigned last year and at that time we had a look for a replacement trustee. It turned out to be quite difficult to identify somebody who would be willing to do that and that remains an issue that I have not yet been able to resolve satisfactorily.

Trustees have a lot of power and the guidance that is put forward is important, but I simply hold up my hands at this point and say that there is a concern about what will happen. I am two months younger than the person that I am a trustee for, so we are in a kind of arms race to see whether we will spend the money first or whether I will continue to be able to function as a trustee. It is an important issue and I am not sure that the bill will help to resolve it.

I wonder whether there is an issue about the court being able to appoint further trustees to help manage the trust in such situations. I am sure that I cannot be the only person in that position because most trusts happen under the wire. They are not necessarily registered anywhere.

Madelaine Sproule: I agree that the balance seems to be good. We welcome the fact that trustees now have default powers and do not have to refer to the Trusts (Scotland) Act 1921 to check those. Equally, it is good to know that the court can step in where required.

I agree with Ian Hood's point, though. That has come up in the Charities (Regulation and Administration) (Scotland) Bill, where OSCR is being given powers to appoint trustees. In general, it can be difficult to identify appropriate trustees. Perhaps some more clarity around how the court would be able to identify those trustees would be useful.

The Convener: Does anyone else want to come in on the issue?

Joan Fraser: If we are talking about the balance of powers and so on, that seems about right to me.

The one thing that concerns me is section 12(1), which says:

"A decision binds the trustees only if made by a majority of those for the time being able to make it."

To me, that means a simple majority for any decision; it does not specify what kind of decision, but it could be something very fundamental. In other circumstances, such as in charity and corporate law, you need a significant majority of two thirds or three quarters for a very significant decision.

That provision could probably be strengthened. It could say something about who needs to define what sort of decision would be regarded as significant enough to require more than a simple majority. That would be a valuable addition.

The Convener: I saw Mike Blair shake his head.

Mike Blair: I am afraid that I was expressing scepticism. Almost all the trusts that I have come across proceed on the basis of simple majority. If they have odd numbers of trustees or trustees who flow in and out from time to time, the extra effort involved in trying to work out what majorities might be strikes me as superfluous. Most of this ought to be covered by the fiduciary duty and the ability of beneficiaries to complain and kick people in the shins if it is not done right. I understand where you are coming from, but I am not sure that it is as major an issue as that.

Joan Fraser: That is the arrangement that applies to charitable trusts and that OSCR requires.

Mike Blair: I suppose—fine.

Joan Fraser: It requires a significant majority—usually two thirds or three quarters—for things such as changing purposes, the constitution or other major decisions that affect the nature of the trust quite significantly.

Chris Sheldon: I go back to the point that Ian Hood raised on the perceived burden on trustees or potential trustees in private or family trusts and charitable trusts. When the Charities and Trustee Investment (Scotland) Act 2005 came into being, there was a concern that charity trustees might not step forward, but that has not been borne out. It is an onerous task and responsibility, and there needs to be careful management of that, particularly where there is potential disincentive in the bill because of potential exposure to trustees' personal patrimony in the event of unnecessary litigation. The messaging also needs to be carefully managed in case potential trustees do not step forward to take on the responsibility for fear of personal exposure to risk.

The Convener: As no one else wants to come in on that question, we will move on to Bill Kidd.

Bill Kidd (Glasgow Anniesland) (SNP): My question is about incapable trustees. On 9 May, we had an evidence session with legal academics, who offered a more relaxed view than some other legal stakeholders on whether there were risks associated with sections 7 and 12 of the bill for incapable adults.

For those of you who are trustees, would you feel confident in your ability as trustees to assess whether a fellow trustee was incapable, as required in sections 7 and 12 of the bill? Would

input from a doctor, psychologist or mental health officer be helpful to you in that regard? If so, should that be formally written into the bill?

Mhairi Maguire: I am happy to start. We have come across that situation. We were asked to make such a decision, despite having no knowledge of the individual personally and having no input in their life beyond having a discussion, several times a year, about releasing funds to another person. We did not find ourselves in a position where we could make that assessment, so we asked for medical support in order to make the decision.

The provision of such support would be useful. I say that as a practising solicitor and someone who works across trusts on an on-going basis. We did not feel that my colleague or I had the ability to make that decision.

Ian Hood, without putting words in your mouth, I am not sure whether, as an individual trustee, you would necessarily feel that you had enough knowledge of the situation to make that decision. Something more prescriptive in the legislation would be useful.

Bill Kidd: On the back of that, if you do not mind, how did you handle that, legally? Did you feel confident in doing that? Were you supported, legally?

Mhairi Maguire: Yes, we had another trustee. It was ourselves at Enable and two family-member trustees. They were not husband and wife or brother and sister, but they were in-laws. The other trustee had also raised concerns, we shared those concerns and it was resolved through the family route; they supported their family member to meet their general practitioner, and we had an assessment of capacity undertaken.

Bill Kidd: That is very helpful. I direct my next question to any panellist who might have something to say on the matter. If it were to be considered that involving doctors, psychologists or mental health officers would be the right route to go down, should that be formally written into the bill? If not, what further support or input would you want a trustee to have in making such decisions? Having heard what Mhairi Maguire said, it seems to me that nothing further needs to be included. Is that correct?

Mhairi Maguire: It might be useful to cross-reference to the provisions of the Adults with Incapacity (Scotland) Act 2000. In a situation in which you are uncertain about the level of a trustee's capacity, or whether the co-trustee has sufficient capacity, following the routes outlined in that act would tie the two together.

Charlie Marshall: I am sorry—I did not quite hear that. I fully understand the system as it applies to trustees who suffer from mental health issues, in that the power to remove them should be available if their actions are contrary to the charity's aims and objectives. However, how does one enforce that?

Mike Blair: I come back to what I said a minute ago about the difficulty of recording that. If a body of trustees, or a solicitor advising them, wants to argue that two of the trustees are too decrepit to contribute sensibly to what is going on, and that two other trustees are the active ones, how does that get recorded? The solicitor would look for something from an external source if there was any doubt about that.

Equally, we are accustomed to dealing with, for example, situations involving powers of attorney, when people get old, become unable, their family recognises that that is the case and no particular formality is required to bring the power of attorney into use to allow someone to act on the person's behalf.

However, there is a grey area in there, which I think professional practice would need to record, as to what would be the prudent thing for the solicitor to do to ensure that they were right to make use of such powers to disregard a particular person's contributions to a trust even though they might still be on the list of trustees.

Bill Kidd: Thank you. I have a further question on the back of what Mhairi Maguire said. She has a legal background, but some trusts might not have people in the same position. Could it be written into the bill that access to doctors, psychologists and mental health officers would be a good thing, so as to give confidence to people who are in such positions?

Would anyone like to comment?

Chris Sheldon: It is difficult to ask lay trustees to assess incapacity. It is a subjective test and one that is difficult to assess. Consideration would have to be given to the extent to which there was evidence of vouching or justification of such an assessment, and that would have to be recorded, both for the trustee or trustees who were making the decision and for the allegedly incapable trustee. Consideration would also have to be given to the extent to which they would have a right to challenge that or would have any awareness of the fact that there was a move to remove them on the ground of a subjective test of incapacity.

In the event of there being two trustees but one being absent, there could be risks, and safeguarding would need to be considered. It would need to be considered how action could be enabled if the present trustee—for vexatious or other personal reasons—determined that their co-trustee was incapable and then took action, such as selling a property or investments or distributing

the fund, without the awareness of their co-trustee. Consideration would also have to be given to whether that co-trustee had the ability to raise a court action to challenge that, which could seek to undo any actions undertaken by the first trustee.

A number of challenges therefore exist, notwithstanding the link that Mhairi Maguire made with the incapacity test under the Adults with Incapacity (Scotland) Act 2000. I am not sure whether the right answer is to bind into the bill an obligation to seek a medical certificate, but further thought is needed on exactly how to manage the situation so as to protect the trustees who are trying to reach the decision and the trustee who will be affected by it.

10:30

Bill Kidd: Thank you. It was helpful to get a range of experience and options that it might be possible to figure in. That was good.

The Convener: Charlie Marshall, you posed a question on the matter a moment ago. Do you have any thoughts on Bill Kidd's question?

Charlie Marshall: If it is written into law that a trustee who is under suspicion of acting in a way that is not commensurate with the aims and objectives of the charity should undergo a medical examination, how would he or she be compelled to undergo it and what form should the medical examination take? There is a world of difference between a GP, a psychiatrist and a psychologist. They all have different skill sets. Who would enforce it and who would decide what form of assessment the trustee would go through? Would the trustee have the right of appeal? If so, how would that appeal be carried out?

The Convener: Okay. That has not come up in evidence over the past few weeks, so that is useful.

Valerie Macniven: I will raise a broader question about process, which relates to the time that all that might take. What would happen if decisions were needed, especially if it was a particularly small trust, during the time when there was doubt about the capacity of one or more of the trustees? It would begin to get a bit technical to specify that in the bill, but I wonder whether there ought to be provision for back-up regulations about the process.

The Convener: Okay. Thank you.

I introduce Andy Cowan, the Parliament photographer, who is here to take some photographs of the committee.

Joan Fraser, would you like to comment?

Joan Fraser: I echo what some other people have said. Section 7 says:

"A trustee who is"

one of four things

"may be removed",

and there are three paragraphs that refer to provable facts—convictions and so on. However, when it comes to

"A trustee who is … incapable,"

who would make that decision? It would have to be "A trustee who is deemed incapable", because the trustees cannot make a decision about whether somebody is incapable.

I have never been involved in a family trust, but I have been on lots of boards that have included trustees who have been there for a very long time and might be very committed to the charity but cannot fulfil the charitable role. Usually, it is a question of gradually and gently easing them out. However, that might not always be possible, so there needs to be a bit of process around a trustee who is deemed incapable. I do not think that you can just say that they are incapable; there needs to be some sort of assessment of capabilities so that it is evidenced in some way.

The Convener: Would what Mhairi Maguire suggested regarding cross-referencing to the Adults with Incapacity (Scotland) Act 2000 be useful?

Joan Fraser: I am not really familiar with that legislation, so I will take Mhairi Maguire's word for it, as she is more expert than I. However, that might be one way of addressing the matter. It might also be worth considering what happens with trustees with incapacity under charity law.

Mhairi Maguire: I will follow up on Valerie Macniven's point about what can be done in the interim if one trustee or more is under suspicion of, or investigation for, being incapable. I had not prepared this before coming to the meeting, so I will check and follow it up.

In a number of the trusts in which Enable is appointed as a trustee, we are appointed with trustee sine qua non powers, which, in effect, makes us the lead trustee. That means that, if mum and dad are on holiday and in some remote part of Timbuktu with no access to internet or telephone signal, we can make a decision if we need to, because we have a lead trustee power. In effect, it is the chair's casting vote in a meeting. We do not use that unless we absolutely have to use it. We confirm that with families when the trusts are set up. However, as a last resort—in dire straits—we will make a decision on our own if we have to, and will then justify it to the other trustees and explain why we took it.

There might be scope to cover that in an explanatory note or guidance rather than in the

legislation, but there are ways to create a lead trustee or to give some sort of power so that, in such a hiatus, it is still possible to make decisions and the beneficiary is not left wanting for any reason. It might be possible to consider that somewhere.

I will find the background to where that originated from but, in effect, a trustee with lead powers might be able to fill the gap.

Mike Blair: On the same theme, there will be situations in which, for whatever reason, there is dissension among the trustees as to what they ought to do. The trustees might be of different ages. For example, if there are four trustees and two of them think that one of the two dissenters is not very able and should therefore be disregarded, you will get into a stramash. I suspect that the bottom line on such things is that you would need to go to court.

However, there is a spectrum between somebody who is clearly no longer able, which most people would be happy to accept, along the same lines as when someone is not able to do a power of attorney, and somebody who thinks that they are thinking straight, despite someone else not thinking so. A measuring stick for that does not exist, so your point about how such things can be resolved and how long that might take will occasionally be an issue.

Chris Sheldon: On Mhairi Maguire's comment, I do not think that sine qua non trustees are referred to in any aspect in connection with the bill or that there has been any consideration of the consequence of that.

The definition of "incapable" under section 75 almost exactly matches that in the Adults with Incapacity (Scotland) Act 2000, although I think that there is some nuance and difference. I have heard, and spoken about with others, a concern about the potential for a drift in definition between the two acts over time and in the awareness of the individuals who try to interpret them. The 2000 act seems the most appropriate place for the review of that assessment, recognising that, in the reform of the law on capacity and in the review of Scottish mental health law, the most appropriate place is probably on that side, rather than in having a separate, distinct definition in the bill, which might become stagnant.

Jeremy Balfour (Lothian) (Con): Chris Sheldon, just to absolutely nail that, is it your view that the bill should not contain a definition but should simply refer back to the one in the Adults with Incapacity (Scotland) Act 2000 so that, if that definition changes at any point, we would not have to reopen the bill before us, as enacted?

Chris Sheldon: That is right.

Jeremy Balfour: That is helpful. Thank you.

Ian Hood: On that point—I was going to raise this later in relation to the powers of the court—I would still prefer mediation.

I have only been involved in a small trust, with a small number of trustees, from which a trustee resigned because she felt that she was incapable of continuing due to personal health reasons. Mediation or another way of resolving such situations would avoid getting into a tight legal battle that swallows up trust resources. I do not know whether a mediation service such as the Advisory, Conciliation and Arbitration Service would be a way of resolving that, rather than, as somebody mentioned, getting into a compulsory inspection of somebody's capability, which would just lead to a difficult situation. Obviously, such grounds have to be covered in legislation, but I did not feel that there was enough in the bill about mediation. In many situations, the issue could be resolved quite easily with a chat.

Jeremy Balfour: I welcome the witnesses to the meeting. For the avoidance of doubt, I declare that I am a member of the Church of Scotland, but I have no financial interests in that regard.

The bill includes new powers for sheriff courts, but the predominant power remains with the Court of Session. What are the pros and cons of that approach? In a previous evidence session, it was suggested that trustees should be able to decide whether their case goes to the sheriff court or the Court of Session, instead of that being prescribed. Does anyone have a view on that?

Valerie Macniven: One would at least have to think about costs. I have not been able to do a final check on the cost of going to one court relative to the cost of going to the other. However, if one court was able to deal with such cases more efficiently and economically, the committee should at least have a look at that.

Mike Blair: I have been involved in Court of Session applications to change trusts. By and large, many of those judges have more acquaintance with such matters. That is not always the case with local sheriffs—in fact, it is probably commonplace for them not to be hugely conversant with that branch of the law, because such matters are not the kind of stuff that comes up.

The point about cost is spot on. The more simply such cases can be dealt with, the easier it will be.

However, given the nature of what we are talking about and that an element of contention will have led to such issues in the first place, it is difficult to get past that. Mediation is a fine thing if it can be done—I have been involved in several

such cases—but it requires both or all parties to play along. That is why courts are the bottom line if we cannot get people to play along. People are open to do that just now, but we need a backstop.

Chris Sheldon: I support the points that Valerie Macniven and Mike Blair have made. It is difficult to strike the right balance between having the right expertise in courts and considering the costs. The bill probably strikes the right balance in relation to sheriff courts and the Court of Session, but there will be circumstances in which a certain court will not be the right one to consider particular matters.

Jeremy Balfour: That is helpful.

In the previous couple of evidence sessions, we have had evidence regarding resolving disputes through mediation or arbitration, which Mike Blair touched on. As he said, that can happen only if everyone is willing to take part. In principle, should such provision be in the bill, or should mediation simply be encouraged in guidance?

Chris Sheldon: I am not sure of the answer to that. I would like mediation to be encouraged, but I am not sure what the consequences would be of enforcing it or whether we would be able to compel people to engage in it. I am not sure of the extent to which people would need to go down the mediation route and get past that barrier to enable them to access the courts. For example, if there had to be a mediation or arbitration process prior to going to court, could that be a barrier to efficiency and speed in enabling the actions of the trustees, which might be hindered by having to go through an obligatory process?

The Convener: Does Madelaine Sproule want to come in?

Madelaine Sproule: [*Inaudible*.]—the question.

Jeremy Balfour: I am sorry, but I could not hear that.

Madelaine Sproule: I am sorry, but I missed the question.

Jeremy Balfour: I was just following up on what had been said. Should the bill formally state that mediation or arbitration should take place before any court action is considered, or should that be covered in the guidance that is given on good practice?

Madelaine Sproule: I agree with the previous speaker. It would be very difficult to compel people to engage in mediation. Therefore, if you make the bill prescriptive, that could lead to delays in decisions being made.

10:45

Ian Hood: I think that mediation should be in the bill. I would be happy for it to be put in as a suggestion. It would not necessarily be there as a preliminary to court action; it would be one of the options that trustees could choose to resolve disputes, whether they are about trustees or any other decisions that they take.

I have to confess to never having been to a court in my life. I know that we have many lawyers present, who I am sure could help, but the reality is that, for many trustees, we would not normally go into that area. I suspect that having a more low-level, informal way of resolving things should be included in the bill to allow people to choose a route that deals with such things easily without getting tied up in court action.

Mike Blair: In practice, most of those issues are argued out among trustees, whether a charitable, testamentary or family trust or whatever is involved, and decisions are reached. As the law stands, there is nothing to prevent people from taking issues to mediation, if they are so minded. I agree with the view that there is no point in making mediation compulsory, as that would just add a stage to the process and would not add hugely to the purpose. Mediation is there if people need it, but we need the backstop.

Valerie Macniven: Mike Blair's point leads on to the point that I was going to make. We are talking about making public law, so we have to be careful that we understand the difference between an informal way of settling a dispute and mediation, which involves certain technicalities. If we were to specify mediation in the bill, we would need to have a cross-reference to what that really meant. We have talked about some of the elements, such as that it needs to be done with the agreement of both parties, but there also needs to be a mediator. Where would that person come from and what qualifications would they need in order to be an appropriate person to deal with the situation?

Charlie Marshall: Mediation and medicals are all very well, but they take a lot of time and, in many cases, money to resolve. Some of the problems that we are talking about could be prevented by having a fixed tenure for all trustees. If the tenure had to be redone at every annual general meeting, a troublesome trustee could be got rid of after a maximum of a year, with no external influence or bills.

Chris Sheldon: I want to reflect on some of the previous points. The court is not necessarily always for disputes—we should recognise the opportunity to petition the court for direction, which is not in the bill at present. The opportunity to ask questions to seek direction is a useful mechanism that could be afforded to trustees.

On the point about mediation or arbitration, trustees ought to know when to take advice,

professional or otherwise. That should not necessarily be bound into legislation, but it should be encouraged as part of recognising trustees' duties.

Mercedes Villalba (North East Scotland) (Lab): I would like to move us on to sections 16 and 17 of the bill, which relate to trustees' powers of investment. The committee heard suggestions from the Law Society of Scotland and the academic Yvonne Evans that, in view of Scotland's increasing emphasis on net zero goals, sections 16 and 17 should be amended to explicitly allow trusts to adopt environmentally friendly investment policies, particularly when those might underperform compared with other investments.

We are interested to hear from everyone on that proposal. Would an amendment to the bill in that regard help to reassure trustees that that kind of investment is allowed, or is the current wording satisfactory? It would also be helpful to hear about any experience that you have had in relation to investment decisions.

Chris Sheldon: I recently attended a webinar that looked at the position in English law and the Butler-Sloss v Charity Commission case, which has clarified that area of law in England. There is a recognition of the evolution and development of the impactful and purposeful acting of trustees, whether that is for a private, family or charity trust.

It is about recognising not only the principal action of investing for growth or for yield to maximise the finances of the trust but the purpose of the trust, whether that is a family trust or a charity trust. Yvonne Evans's additional proposal is useful in clarifying that, in relation to not only environmental principles but social, governance or purposeful principles, there may be a price for those principles in terms of investment or financial gain. However, in some particular trusts, that will be appropriate because of the nature of the beneficiaries or because of the settlors and their particular wishes.

Mike Blair: I suspect that that goes back to the purpose of the trust. If the purpose of the trust is focused in that direction, deciding to put its resources in something that pushes things along in that direction is fine. If, on the other hand, it is money that you are being told to look after by a granddad for the grandchildren without any particular specification, you are at some risk, at least, of the trustees second-guessing what is good for the country at large versus what is good for the people who might be getting the money later in the day. That is not an easy thing to decide unless there is some sort of warrant for it because of how the trust was set up in the first place or how it has been modified over time. There is nothing to stop people doing that just now, but there is a balance to be struck in what we are trying to achieve. What is the aim?

Charlie Marshall: I will be brief. I do not think that we should be in the position of trying to tell trustees what they should or should not invest in. Their primary responsibility is to get as much as they can for the charity, regardless of what might or might not be perceived to be the common weal.

Valerie Macniven: I suspect that the Church of Scotland, in meeting in general assembly this week, will touch on that issue from time to time. It is probably relevant to mention that the debate there is likely to be very wide. What is important is that you have flexibility and breadth in the powers without being too specific. It seems to me that the wording of section 17 is currently pretty broad and that trying to tie it down could lead to difficulties, depending on how far you go.

Joan Fraser: My area of knowledge largely relates to charitable trusts. OSCR, as the charity regulator, has issued guidance to charitable trusts about investment and balancing the aim of trying to maximise your income—so that you can maximise your grant making in accordance with the purposes of the trust—against ethical, social and governance concerns. Most charitable trusts nowadays have an ethical investment policy or an ESG policy. That could be something to consider.

It is not the case that the duty of a trustee is only to maximise the gain—certainly not in charitable trusts. They have to balance maximising income against the charitable purposes of the trust. For example, because the business of the Edinburgh and Lothian Trust Fund is all about helping people in poverty, we do not invest in alcohol, tobacco, gambling and various other things that are areas of harm, particularly for people in poverty. Therefore, I do not see that there is a difficulty in saying that trustees of any kind should balance the objectives of the trust against the ethical dimension to investing.

Chris Sheldon: I will follow up the point that trustees might feel exposed if they take a particular view for a social purpose and, because of their actions, there is underperformance or even a loss. Trustees need to be afforded protection in connection with that. A slight clarification is needed in the bill to empower trustees to make such an impact or make ESG-type investments in the knowledge that they will not be vulnerable to a claim or challenge if, under such a policy, investments underperformed or even incurred a loss because of such impactful decisions.

The Convener: Does anyone who is online want to contribute?

Madelaine Sproule: I agree with the points that have been made. It is difficult to make a positive direction in the bill on the matter, but anything that

can clarify that trustees will not be penalised for having such an investment strategy would be a good thing to protect trustees' interests.

Oliver Mundell (Dumfriesshire) (Con): I am interested in sections 25 and 26. Concern has been expressed to the committee that trustees' duties to provide information to beneficiaries and potential beneficiaries under those sections are too onerous and that the extent of the duties is uncertain. Do you want to share your views on the provisions, particularly if you have concerns? I am interested in how you would change the sections to address those concerns.

The Convener: Who would like to start? Mike?

Mike Blair: Did I move my head by mistake? [*Laughter.*] Occasionally, one comes across different attitudes between trustees and potential beneficiaries. I suppose that solicitors on the panel who are involved in private practice will have occasionally come across that. You hear of people not letting on about exactly what the trust says or does or refusing to provide information for beneficiaries or potential beneficiaries.

Sometimes that is just thrawnness or dissent on the part of trustees who do not think that it is any business of people whom they view as being remote connections to the trust to be provided with information, but there can be other situations where it is proper that people should know what is going on. In a testamentary trust, for example, when somebody dies and money has to be managed for some years—perhaps until children grow up—if there is not reasonable clarity as to what is going on, people will be disadvantaged, because they are entitled to conduct their affairs in the knowledge of where they stand.

I have no magic test to say when trustees must or must not disclose stuff; I have often thought in practice that difficulties tend to arise when people try to keep information too close to their chest unnecessarily, but that is in the eye of the beholder.

Mhairi Maguire: My example is quite specific, but it might give context to why trustees should have a duty to provide information on request. Let us take the example of a discretionary trust that has only one sole beneficiary—a trust that is without a class of beneficiaries and has an absolute beneficiary—who is also in receipt of means-tested state benefits and has a duty to provide information on their entire estate to HM Revenue and Customs or to a local authority for an assessment of their benefits. That person needs the information; if information was withheld from HMRC or the local authority when a person was going through an assessment for state benefits, that would ultimately prejudice the individual's position. If they do not have the information from the trustees, when that person is the absolute beneficiary and there is no other potential beneficiary to the trust, that ultimately hurts the beneficiary of the trust. In the discretionary trusts that Enable works with, the ultimate goal is to protect the beneficiary and not to cause them financial harm or hardship by withholding information.

The Convener: Would you like to comment, Valerie Macniven?

11:00

Valerie Macniven: I do not think that I have got much to contribute on that one. I will make one point in relation to the trusts that the Church of Scotland Trust is concerned with: at the end of the day, the beneficiaries are often so broad that we would not really know who they were. I gave examples in my introduction to do with the children of clergy and the provision of housing. We just have to be careful that we have not specified in a way that one could have a challenge from somebody we do not think is a beneficiary but who had become aware of a trust and perhaps thinks that they are missing out on something.

I really do not have much to say on the provisions themselves.

The Convener: From a beneficiary's perspective, how easy it is to access information about trusts in which you have an interest, Charlie Marshall?

Charlie Marshall: I will not comment any further on that one, if you do not mind.

The Convener: No bother.

Chris Sheldon: In relation to Mhairi Maguire's comments, I want to highlight the opposite effect of having a trust with a very broad range of potential beneficiaries. In those circumstances, you need to understand the scope and the likelihood of a potential beneficiary, how that is borne out and what actions trustees might then take to exclude individuals who are seeking to find information about a trust in which it is unlikely that they would ever receive a beneficial interest, and to understand how that might be monitored.

Other than that, I have no comments that have not already been made in previous submissions, particularly through the Law Society of Scotland.

Oliver Mundell: I want to move on to section 61 of the bill, which gives power to the beneficiaries and others to apply to the court to alter the purposes of a family trust where there is a material change of circumstances. The section sets out the default position that that power cannot be used for 25 years. Is having such a 25-year restriction the

correct approach? We would be interested to hear your views on that and your reasoning.

Mhairi Maguire: I used to work with family trusts, but that was maybe 15 years ago. Most of the trusts that I tend to work in are slightly different now.

With the trusts, the beneficiaries and the families that we work with, there are people in and around the trusts—trustees and beneficiaries—who are living with relatively tight constraints. For that group of people, that 25-year restriction would be quite difficult to deal with. Say that there is money in the trust that has bespoke and very restricted purposes, but the family falls into hardship more widely and they were unable to access that money beyond those specific purposes for 25 years, it would be quite challenging. However, there are trusts at the other end of the spectrum for which that would not be an issue.

Madelaine Sproule: That is not really an area that I work in at all, because it relates only to private trusts. However, I would agree with Mhairi Maguire that 25 years could be too long for certain groups of beneficiaries.

Mike Blair: I have been involved in varying trusts—usually to get out of a thing that had not been thought to be a problem in 1980 but was going to be a problem in 2020. I suspect that Chris Sheldon will have seen similar sorts of stuff.

Changing private trusts around like that is a new exploration. I have not fully read the Scottish Law Commission's report on the subject, but the idea that you need to be able to change things from time to time and to redirect what is happening seems to me to be very necessary.

I suppose that you could make 25 years the normal timeframe, but if special cause is shown, you could go to the court or something like that. The idea is that people cannot just constantly mess around with what was set up by the guy who set it up in the first place just because those people change their minds five, 10 or 12 years later.

Chris Sheldon: I agree with Mike Blair's point. The bar should be set appropriately high when seeking to override the wishes of the settlor in determining the trust purposes and the trust arrangements. I am not sure whether the time limit is necessarily the right factor for that. I do not necessarily see the 25-year period as entirely appropriate; indeed, I am not sure whether there ought to be a time period at all. I understand that it is one potential measure in order to put in place a high bar for change, potentially as a generational move in relation to evolutionary development of the trust where circumstances have changed over that period of time. However, I am not entirely convinced by the setting of a provision of time, particularly one as long as 25 years, which seems too long.

The Convener: If that is not to be the mechanism, what would you like to see?

Chris Sheldon: If it is to be justified on the grounds of circumstantial change, I would expect to see a substantial shift and deviation from the settlor's wishes and the extent of the provision of trust that was put in place in the first place, as well as the requirement to set out a case as to why it is appropriate.

In a similar way to how you would petition the Court of Session as to why a variation is justified and rationalised and why it should be accepted, a petition should be put forward as to what the substantial changes are, the extent to which the variation does not disbenefit the individuals and why it is necessary. It should not necessarily be specified that you have to get beyond a 25-year period before that opportunity presents itself.

Ian Hood: In the case of the trust that I am involved with, the settlor is, in fact, the beneficiary. When he received his compensation, he decided to place it in a trust to help him manage that money. I am sure that not all settlors are deceased and may therefore have a continuing viewpoint, as is the case in that situation. After the trust has been set up, a point may come in the future when the current beneficiary may choose to seek an amendment to the trust, for which there should be an option. Twenty-five years from when the trust was set up is, in fact, not that far from now; 25 years from now, however, might be far too long. An earlier date as an option would therefore be helpful in some situations.

Oliver Mundell: Touching on that point, but more broadly, on 9 May we heard from legal academics including Professor Gretton and Yvonne Evans, who said that, in practice, a solicitor would just "draft around" a 25-year provision. This question may be for Chris Sheldon and Mike Blair: are we worrying too much about it? Would most trusts be drafted to give some leeway in relation to purpose?

Chris Sheldon: I am not sure that that approach would be a helpful consequence. Trusters or settlors would then need to reflect on the fact that they could not anticipate future change and evolution of circumstances. If they were at a particular stage in their life, the settlors would have anticipated that the trust would exist beyond them, as well as the inability of the trustees to adjust because circumstances have changed; some settlors would not wish any circumstantial change to affect the trust terms. However, looking to modernise—which the bill does—you would want to be in a situation where a

settlor could be aware of the fact that the provision existed.

However, if there was an awareness that it was a 25-year period, I think that you might see drafting around that and a broadening of trust purposes that may be much more broad ranging than the settlor had anticipated and not necessarily what the settlor wants to put in place, but is something that they have been forced to do. For instance, if there are no further family beneficiaries or direct descendants, because they pass away, it might be conceived that the settlor would wish to see charities benefit. If there is not, for instance, power to add beneficiaries of a charitable nature, the trustees might seek a petition to include charitable beneficiaries. However, it would not otherwise have been in the mind of the settlor to include charitable beneficiaries from the instance, because of the fact that it was a trust designed to be for family members and direct descendants.

If there was a barrier of a 25-year period, I think that we would see a broadening of trust purposes from the outset, but I am not necessarily sure that that would be a positive consequence.

Mike Blair: I have nothing to add to what Chris Sheldon said.

The Convener: Does anyone else want to come in before we move on?

If not, we move to questions from Mercedes Villalba.

Mercedes Villalba: I move us on to sections 65 and 66 of the bill, which relate to expenses of litigation.

The committee has heard from the Law Society of Scotland and some other legal stakeholders, who are concerned about the current policy underpinning section 65. This section provides principles to determine how legal bills are paid for in trust cases. Specifically, it provides that trustees will be "personally liable" for those expenses in certain situations, including when the trust fund does not have enough resources to cover them.

The Law Society thinks that section 65 will deter people from becoming trustees and may lead trustees to unfavourably settle or abandon legal proceedings for fear of personal liability.

We are keen to hear whether you share those concerns, or whether you can offer the committee any reassurance. As a follow-up, do you think that the availability of insurance helps to mitigate the risks that the Law Society has identified?

Valerie Macniven: You have stated the situation pretty clearly. As we have heard, it is not always easy to find trustees, and anything that is seen as a disincentive would clearly make matters worse, so there is a real issue there.

I think that the question of insurance is covered elsewhere in the bill. In principle, it is a mitigation for trustees. I am involved in another trust where we have insurance, although our risks are very low. I have heard elsewhere that it is not always easy to find such insurance, however, so one aspect has to be balanced with the other. There is a risk of disincentivising trustees, but that could be mitigated by insurance, if the right policy could be found.

The Convener: I turn to Mike Blair. Gillespie Macandrew told us that it was

"dangerous ... to rely on insurance".—[*Official Report, Delegated Powers and Law Reform Committee,* 16 May 2023; c 20.]

Mike Blair: I subscribe to that view, with regard to what Valerie Macniven said about the issue of getting hold of insurance. It cannot be insurance against you doing something daft as a trustee, because you should not be doing it in the first place. Is it insurance against some daft claim against you? Well, that is probably much more desirable, and indeed that is what a lot of domestic insurance contains. I have no direct experience of going around looking for such insurance.

On the business about trustees' personal liability, the question is, if it is the trustees who are engaging in some dispute, which they sensibly ought not to do, why should they not be personally sticking their necks out? If, on the other hand, it is something that has come to them, that is a different situation entirely, and it puts them in an invidious position of having to either roll over because they do not have the resources to defend the case or stick their neck out.

Madelaine Sproule: From a practical point of view, I was asked to look into obtaining trustee indemnity insurance for the Church of Scotland Trust. The Church of Scotland has its own insurance services company, and it has been unable to source appropriate trustee indemnity insurance both for the Church of Scotland Trust and for the housing and loan fund trustees. That is something to bear in mind: while insurance would mitigate some of the provisions in the bill, it is not altogether easy to find.

Joan Fraser: I agree that it is not easy to find, but there are one or two companies that do trustee indemnity insurance. There may be differences in the Church of Scotland Trust that makes those policies not appropriate for it, but the Edinburgh and Lothian Trust Fund certainly has trustee indemnity insurance.

11:15

However, Mike Blair is absolutely right that that does not insure against failing to exercise duties properly. If we acted unlawfully, the policy would be null and void, but if we ended up on the wrong end of some sort of lawsuit, through no fault of our own, indemnity insurance would cover us.

Mhairi Maguire: That is where the dichotomy between professional trustees and personal trustees comes in. We have various business insurances that cover liabilities for certain things, but potentially, individuals do not have the means or the ability to source such insurance.

I do not know quite how it would slot into the bill, but perhaps insurance premiums could be borne out of trust estates, and beyond that there could be some sort of funding available—legal aid funding, for example—or some sort of eligibility towards contribution of costs.

Thinking back to the point that Ian Hood made earlier, that risk could ultimately put people off being trustees, and there is already a dearth of volunteers coming forward in some areas. It would be a significant barrier to know that even if insurance is in place, it does not necessarily protect against all of an individual's actions and that they are effectively personally liable for certain things simply because they came forward to help other people.

Chris Sheldon: I agree with that. It could be an unwelcome headline disincentive for potential volunteers to become trustees, who are in most cases, in unpaid office. Being a trustee is a responsibility, and as I mentioned, it is a high and onerous obligation to undertake the role.

Also, the potential influence on the acts of litigation and defending a claim are unfavourable. The aspects relating to insurance, which have already been mentioned, wholly depend on the market for that being available. I share the concerns in the Law Society's submission; I should mention that I sit on its trust and succession law sub-committee. I was not directly involved in the submission that it made, but I share the views in it.

The Convener: Charlie Marshall, do you want to come in?

Charlie Marshall: No.

Bill Kidd: Thanks to all of the guests; they have provided us with some interesting evidence that will help the bill. However, there may be omissions to the bill that people have views on. Although Christmas is not coming soon, what would witnesses like to have seen in part 1 of the bill that has not been mentioned so far, and is there anything that should be included?

Valerie Macniven: I will turn back to the role of the court, which we spoke about before. I am a bit concerned that there is no obvious way, through the bill, for a public trust to seek a variation short of going to the Court of Session, which we simply have to do sometimes. There is obviously a balance to be struck, because we do not want to allow trustees to vary at will, but perhaps we will never get another chance to look at that issue. It has taken 102 years to get from where we were to where we are now, and this is the one and only chance, so perhaps we should put a marker down.

Jeremy Balfour: In what way do you see that happening? If you go to the Court of Session, what way do you see of allowing that without giving the trustees too much power?

Valerie Macniven: That is the difficulty. In the miscellaneous trusts that I am concerned with, there is sometimes an opportunity to move from one specification to another—for example, if money was left for the benefit of a particular church and that church no longer exists, there may be a way of moving it to something that is equally acceptable, but there are boundaries to be set.

I agree that it is difficult. However, I am sure that legal wording can be found to create some kind of opportunity, but with checks and balances built in to prevent trustees from just varying provisions at will whenever they come across an issue or difficulty.

Ian Hood: First, I want to go back to the issue of liability insurance. As a private trustee, I do not have any. I can see a situation in which, on the death of the beneficiary, the powers that we have as a trust to decide where the money goes might be challengeable or challenged by relatives. Before I read the bill, I was not aware that there is a personal liability. Obviously, that is now a concern for me, never mind anybody who might become a trustee in future.

My second point is about what might be in the bill. I wonder whether trusts should be registered with a court when they are set up. I could be mistaken, but my understanding is that trusts do not have to be registered anywhere and are not known about, except by the people involved. A power of attorney can be written up by anybody but needs to be registered with a court for it to take effect. I wonder whether trusts should at least have some kind of opportunity for public acknowledgement of their existence. That could be included in the bill.

The Convener: Jeremy, do you want to come in?

Jeremy Balfour: I have a couple of questions, convener.

The Convener: I will go round the other witnesses first.

Mike, do you want to comment on omissions?

Mike Blair: I do not think that I know enough to comment usefully on omissions. It is not my field in a big enough way.

Joan Fraser: The big concern is that the bill does not really fulfil the expectations that are set out in the policy memorandum, which says how important it is that lay trustees can understand the legislation, and that the aim of the bill is to ensure that the law of trusts is "clear" and "coherent". As a lay person, I do not think that it does that. There are numerous kinds of trusts, but nowhere does the bill explain them. There are commercial trusts, charitable trusts, private purpose trusts and public trusts. Somewhere in the bill or the explanatory notes, there needs to be an explanation of what those different things are.

Also, the interface with charitable trusts could be improved—today's discussion has made me feel that even more strongly. The explanatory note says that the bill does not apply to charitable trusts—oh, except when it does. However, it does not go on to say which sections apply to which kinds of trusts. As a non-lawyer, I found the bill very confusing in that respect. I should be able to read the bill and see which provisions apply to which trusts. I do not think that the bill enables that.

More clarity and coherence and a better interface with charitable trust law would be welcome.

The Convener: Charlie, do you want to comment?

Charlie Marshall: No, thanks.

The Convener: Okay. Mhairi?

Mhairi Maguire: I have just two points. The first is about the lead trustee. I think that that could resolve mediation-type situations before they get to that stage.

Secondly, when we see trusts coming through, more often than not there is no reference to the underlying legislation. To go back to Ian Hood's point, and just to reinforce my thinking on that, particularly for individual trustees or people who are trustees of a single trust for a family member, being directed to the underlying legislation might resolve a lot of issues before they come to a head. Obviously, the explanatory notes and so on might be more useful than the actual legislation, but there should be a direction on where to go.

Chris Sheldon: To pick up on Joan Fraser's point, it is about clarity.

Through the Charities (Regulation and Administration) (Scotland) Bill, which is going through Parliament simultaneously with the Trusts and Succession (Scotland) Bill, OSCR will have the power to appoint interim trustees. Will the definition of trustee in the Trusts and Succession (Scotland) Bill include interim trustees?

There is also the point that Mhairi Maguire made about the sine qua non trustee or lead trustee. Also, I cannot see a default power for trustees to add a trustee or trustees.

Madelaine Sproule: [*Inaudible*.]—back to what Joan Fraser said, the crossover between the legislation that affects charitable trusts and the legislation that affects charities and other trusts is not entirely clear. I think that that could be specified better in the bill.

There is also no definition of public trust in the bill; it would be helpful to provide one.

The Convener: Just before we move on, I know that Valerie Macniven has to leave at 11.30. Valerie, is there anything else that you would like to put on the record before you go?

Valerie Macniven: No, I think that that last opportunity to intervene was enough. I just hope that my comments have been useful to the committee.

The Convener: They certainly have—thank you very much.

Jeremy Balfour: I have a couple of quick questions, following on from Chris Sheldon's comment on the two bills. I have the privilege of sitting on the Social Justice and Social Security Committee, which is looking at the Charities (Regulation and Administration) (Scotland) Bill. You have mentioned one area, but is there anything else that you think needs to be clarified between the two bills at this stage?

Chris Sheldon: Not to be clarified as such but there is the aspect of the accumulation of income. I think the question has probably been raised in other contributions as to why the charitable trusts are excluded and whether it is still appropriate to exclude them. However, I am not aware of any other misalignments.

The Convener: Charlie—I know that you are leaving now. Thank you very much for your evidence.

Charlie Marshall: My pleasure and I thank you all.

Jeremy Balfour: Joan, I am interested in what you said in your opening statement about some trusts not being covered in this bill. You mentioned some of the gardens around Edinburgh. Can you tell me a bit more about why you think that they are not included?

Joan Fraser: As a layperson, I do not know the definitions of what the different kinds of trusts are. There are people here who are much more expert than I am and could list them, but there seem to be half a dozen different kinds of trusts without any indication of how you would decide, if you were involved with a trust, which heading it fell under and which type of trust it was. Therefore, after reading the bill, it is impossible for me to say that the park trust that I am involved with is covered. I thought that it must be a private purpose trust but I do not think that it is, so I do not know what it is.

My point about other gardens and so on in Edinburgh is that I suspect that, in the late 19th century, if people could afford it, they bought up bits of land so that there would be green space for their private use in the city. It might be useful to explore the nature of those arrangements now. Some of them will be trusts, I think. I know that one is definitely a company and has been since the very beginning, at the end of the 19th century. However, there might be other arrangements and they might not quite fit with this legislation.

If, as Valerie Macniven said, we are overhauling the legislation 102 years on, I would not want to have to wait another 102 years to include something that we could cover now. Does that answer your question?

Jeremy Balfour: I wonder, as we have got a few lawyers around this table, whether they want to comment on that. Is that a concern that the committee should have?

Chris Sheldon: In some historical trusts, whether they are generally trusts or unincorporated associations with a committee, they may have turned into a group of members with a board or a governing arrangement. The lack of certainty around the clarification of legal status is being helped through the creation of Scottish charitable incorporated organisations. Many unincorporated associations have not had that clarity previously—they may not have had a written constitution or they may just have had it on an A4 bit of paper. If they are looking to formalise their arrangements and to create some protection for the individuals as charity trustees, they can move to being a SCIO, but there is not necessarily the same type of recognition of the conversion of an unincorporated association to a trust. With some of those historical arrangements, it can be quite nuanced as to what you are actually dealing with.

11:30

Joan Fraser: On the Newhaven Park Trust that I am thinking about, the possibility of becoming a SCIO or a registered charity was explored some time ago, but we do not have a charitable purpose, so we do not qualify as a charity. We provide services, but we are not a charitable trust, so that would not help us.

Mike Blair: For what it is worth, you sound like a private purpose trust, as far as I read this stuff.

Joan Fraser: Thank you for that free legal advice. [*Laughter*.]

Mike Blair: Let me roll back from that being too definitive because, as I said at the start, trust law as such is not my primary stuff; I just come across it under a number of other conditions.

There is a whole variety of other arrangements out there in the country, one way or the next. I was once asked to opine upon a very peculiar arrangement, by which a piece of ground was, sort of, owned by the people who owned the adjacent feus, but it was not at all obvious what it was. As a professor at the University of Dundee had been involved, I hesitated to dig too deep.

The problem with trying to categorise those arrangements is that you will end up with fuzzy edges. I have not read the bill well enough to understand how the definitions flow through into it, and I suspect that it might be more thought through than I presently understand it to be.

Mhairi Maguire: I have to confess that it is not my area of expertise. Beyond the realms of vulnerable person's and disabled person's trusts, I am now too far removed from it in practice to safely give you a view.

Bill Kidd: We are nearly at the end of the meeting, so do not worry, but you were, of course, invited here because of your roles in relation to trusts, even if those are not always entirely direct roles.

However, you will be aware that part 2 of the bill is on succession law. We have heard evidence from others about that, including to do with section 72. People believe that a distinction should be made between spouses and civil partners who were living with the deceased at the time of their death and spouses and civil partners who were living separately and had no intention of continuing in a relationship. That is an example of the kind of succession law debate that we have been having. Do you want to mention anything with regard to that element of the bill?

Mhairi Maguire: The only thing that crossed my mind is with regard to partners who are in long-term relationships but do not live together—people who have been in relationships for 10 or 20 years or more but who, for whatever reason, choose not to live together. They are not covered and there are no protections for either of those people. I know that that is quite unconventional, but I am aware of a live situation where someone has

passed away who was in a relationship for more than 20 years but did not live with their partner and was not married. It is a bit unusual, but it does happen.

Bill Kidd: That has been mentioned before. Thank you for that.

Mike Blair: That is a typical example of the inevitable fuzzy edges of these things. I incline to the view that, if you make the rules clear, people can work around them. People do not always work around them, but it is probably at least as good a legislative solution as leaving it as a situation where people have to ask, "Well, maybe they have moved out, but how long have they moved out for?" How do you weigh all that up? It is the choice of you folks, I think, as to how you play that in terms of the legislation, but there is merit in trying to be clear about it and not making too many allowances for the cases in between times, because, let us face it, people can always make their wills in such a way as to get around most of these things.

Chris Sheldon: It is a bit like the subjective test of incapacity. Can there be a subjective test of whether there was a prospective reconciliation as a genuine couple at the point of death, regardless of whether the couple cohabited? It is difficult. I have had only one such case. An individual had passed away after they had filed for divorce but they had not proceeded to complete it prior to their death. I recognise it as an area that needs to be addressed, but how to build in a definition of separation is not straightforward.

The Convener: Okay, thank you. Joan?

Joan Fraser: I do not have anything to comment.

The Convener: Thank you. Madelaine?

Madelaine Sproule: This is not my area of professional expertise at all, but the proposals seem to be fairly sensible and in line with public expectations, although I think that it is very subjective.

The Convener: Thank you. Ian?

Ian Hood: I have no comment on this.

The Convener: Okay, thank you.

Before we close the session, would anyone like to highlight anything that we have not had a chance to discuss thus far?

Mike Blair: No.

Joan Fraser: No.

Mhairi Maguire: No.

Chris Sheldon: There is just one point, which was on the agenda but we have not got to. That is on the protector's power in relation to domicile. I do not understand the justification for the protector's ability to move the domicile of a Scots trust.

The Convener: Okay, thank you.

Madelaine Sproule: I have nothing further.

Ian Hood: I have nothing further.

The Convener: With that, I thank everyone for their contribution, through their written submissions as well as coming to the committee. If you think of anything over the next few days that you think it might be useful to contact the committee about, please do so. We are looking for anything that will help in the process of the bill going through the parliamentary process.

Thank you once again for all your helpful evidence. The committee might follow up by letter with any additional questions stemming from today's meeting.

11:37

Meeting suspended.

11:41

On resuming—

Instruments subject to Affirmative Procedure

The Convener: Under agenda item 3, we are considering instruments subject to the draft affirmative procedure, on which no points have been raised.

Animal By-Products and Animal Health (Miscellaneous Fees) (Scotland) Regulations 2023 [Draft]

Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 (Application to Civil Partnerships and Consequential Provision) Order 2023 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

11:41

The Convener: Under agenda item 4, we are considering instruments subject to the negative procedure, on which no points have been raised.

Education (Fees and Student Support) (Miscellaneous Amendment) (Scotland) Regulations 2023 (SSI 2023/142)

Animal Health (Miscellaneous Fees) (Amendment and Revocation) (Scotland) Order 2023 (SSI 2023/143)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

11:41

The Convener: Under agenda item 5, we are considering instruments that are not subject to any parliamentary procedure, on which no points have been raised.

Burial and Cremation (Scotland) Act 2016 (Commencement No 5) Regulations 2023 (SSI 2023/145 (C 14))

Civil Partnership (Scotland) Act 2020 (Commencement No 5) Regulations 2023 (SSI 2023/146 (C 15))

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

11:42

Meeting continued in private until 12:09.

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